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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to European Union institutions

Note by the Secretariat

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited European Union institutions in Brussels from 25 to 28 April 2016. The mission sought to consult in situ with relevant entities and actors in the European Union on the their work with respect to the activities of private military and security companies and foreign fighters, respectively, and their effects on human rights, particularly the right of peoples to self-determination.

On foreign fighters, the mission was undertaken at a time of heightened tension, following a series of attacks in European Union member States, the most recent of which had occurred on 22 March 2016 in Brussels, just a few weeks before the visit, and had claimed more than 30 lives. The visit was part of the Working Group's ongoing study of the foreign fighter phenomenon, which has included visits to Tunisia, Belgium and Ukraine, expert panels, expert meetings and a thematic report on the subject submitted in 2015 to the General Assembly (A/70/330).

During the visit, the Working Group learned that an estimated 5,000 to 6,000 nationals of European Union member States had travelled abroad to engage in combat, largely in the Middle East. Their motivations varied and ranged from reasons related to ideology, religion, a search for a sense of belonging or for adventure, as well as financial compensation or material gain.

A number of laws and measures addressing the issue of foreign fighters have been adopted by European Union institutions, essentially under the rubric of counter-terrorism. The Working Group commends the European Union on its efforts towards compliance with

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human rights obligations on issues such as protection of the right to privacy and expresses its concern with the human rights implications of other measures, such as freedom of movement, in the projected integration of Security Council resolution 2178 (2014) into a new directive.

The Working Group emphasizes that initiatives to address the issue of foreign fighters must ensure a balance between punitive security measures and preventive, more socially oriented efforts that address the root causes of the problem. It calls for there to be stronger links between human rights concerns and the foreign fighter response, and emphasizes that human rights concerns should be of greater consideration when conceiving and executing responses to the foreign fighter issue.

With regard to private military and security companies, the Working Group met with relevant officials of European Union institutions and learned about the reasons why such companies were excluded from the regulations laid out in the Services Directive.

The Working Group was encouraged by a report on regulating private military and security companies within the European Union, currently being prepared by the European Parliament Committee on Foreign Affairs Subcommittee on Security and Defence, for consideration by the European Parliament. This follows their 2011 paper on the role of private security companies in Common Security and Defence Policy missions and operations, and their public hearing in December 2015 on the use of private security companies in the context of European security and defence.

Furthermore, the Working Group was informed of the European Union internal institutional methods for blacklisting private military and security companies connected to possible human rights violations. It urges civil society actors to be actively involved in sharing related allegations with the relevant department of the European Union.

As the use of private military and security companies grows, both within the European Union and by companies registered within the European Union, concerns about the responsibility of transnational actors become ever more imperative. The Working Group calls upon Member States, European Union institutions and civil society actors to seize the nascent momentum to develop a strong architecture for preventing human rights violations and ensuring effective legally binding accountability and remedy for victims.

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to European Union institutions*

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* Circulated in the language of submission only.

I. Introduction

1. The Working Group on the use of mercenaries, represented by its Chair, Elzbieta Karska, undertook a visit to the European Union in Brussels from 25 to 28 April 2016. The Working Group wishes to thank the European Union for extending its invitation and expresses its appreciation for the meetings held with various representatives from the different functional entities and with members of civil society organizations. The Working Group also appreciates the support provided by the OHCHR Regional Office for Europe in Brussels for the visit.

2. The Working Group is mandated by the Human Rights Council to monitor mercenaries and mercenary-related activities. In that regard, it studies and identifies sources, causes, emerging issues, manifestations and trends not only concerning mercenaries as defined in international law, but also mercenary-related activities and their impacts on human rights, notably on the rights of peoples to self-determination. It is also mandated to monitor the activities of private and military security companies and their impact on human rights, particularly the right to self-determination.

3. Since 2014, the Working Group has been exploring possible linkages between the phenomena of mercenarism and foreign fighters and their impact on human rights and the right of peoples to self-determination. Its study on foreign fighters has involved country visits to Tunisia, Belgium and Ukraine, expert meetings, two public panels and its 2015 report to the General Assembly (A/70/330).

4. The Working Group's objectives for its visit to European Union institutions were to consult in situ with relevant entities and actors within the European Union on their work with respect to the activities of private military and security companies and foreign fighters, respectively, and their effects on human rights, particularly the right of peoples to self-determination.

II. Foreign fighters

A. Background and context of the visit

5. The visit came at a time of amplified tension for European Union institutions regarding the issue of foreign fighters. It followed the terrorist attacks in Brussels on 22 March 2016 that resulted in the deaths of 32 people and injured more than 300 persons. Responsibility for the attack, which took place at the airport and in a metro station close to European institution buildings, was claimed by the so-called Islamic State in Iraq and the Levant. The attacks came soon after a series of similar incidents in the region, including an attack at the Jewish Museum in Brussels in May 2014, the January 2015 raids in Verviers, Belgium, the attack on the headquarters of the *Charlie Hebdo* newspaper in Paris also in January 2015, and attacks in Paris in November 2015.

6. The Working Group was informed that an estimated 5,000 to 6,000 foreign fighters in conflicts in the Middle East had originated from European Union member States, mostly from the Belgium, France, Germany and the United Kingdom of Great Britain and Northern Ireland. While the flow of foreign fighters had reportedly slowed in around the previous 9 months, a marked increase had been observed in the participation of young people, with an average age of 20.5 years, including females.

B. Definition and scope

7. The Working Group uses the term "foreign fighters" to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology or religious convictions. However, like mercenaries, a foreign fighter may also be drawn to a conflict abroad by the promise of financial gain or reward.

8. Unlike the term "mercenary", which is clearly defined in international law, there is no internationally agreed legal definition of foreign fighter or a specific regime governing them. Foreign fighters are, however, obliged to respect applicable rules of international humanitarian law during armed conflicts. In non-international armed conflicts, non-State armed groups, including foreign fighters, do not enjoy combatant immunity and may be prosecuted under domestic law simply for their participation in hostilities.[1]

9. The Working Group notes with some concern that there is similarly no operational definition of foreign fighter applied by the European Union. Current efforts seek to define the crime of travelling for terrorist purposes, which focuses on foreign terrorist fighters. While Security Council resolution 2178 (2014) includes a definition of foreign terrorist fighter, the Working Group notes that not all foreign fighters are foreign terrorist fighters, as not all foreign fighters target civilians or belong to terrorist groups. However, there is reason for concern that, as States seek to implement resolution 2178 (2014), they will equate "foreign fighter" with "foreign terrorist fighter".

10. On 2 December 2015, the European Commission adopted a proposal for a directive on combating terrorism that addresses the threats of foreign terrorist fighters and is part of its strategy to fight terrorism. It is complemented by other initiatives, including those seeking to tackle the root causes of terrorism.

11. The Working Group notes that the European Union has been applying the definition of terrorist offences for some 12 years. The Working Group believes that augmented clarity through a comprehensive definition of terrorism will enforce the principle of legality and potentially mitigate selective interpretation of offences and related criminal liability.

C. International and European Union law

12. Among the European Union member States, Belgium and Italy have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Germany and Poland have signed, but not ratified, the Convention. All 28 European Union member States are, however, party to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, article 47 of which defines mercenaries.

13. The Working Group would like to repeat the concerns it raised in its 2015 report to the General Assembly (A/70/330) that aspects of resolution 2178 (2014) are vague and overbroad, leading to potential infringement on human rights and other violations of international law. In particular, it impinges on the freedom of movement by effectively prohibiting travel to conflict zones, denying the return of States' own citizens or nationals and possibly restricting the scope of humanitarian action in conflict zones. Under the resolution, States may adopt powers to revoke citizenship, thus rendering persons stateless. They may also assume greater powers of surveillance and traveller risk assessment

[1] See the Working Group's assessment in its 2015 report to the General Assembly (A/70/330).

practices that violate the right to privacy. Similarly, interpretation of the resolution may lead to infringements of due process rights in the detention of suspects. In addition, in its resolution 2178 (2014), the Security Council does not acknowledge the application of international humanitarian law in armed conflict situations. It is important in this respect to understand that mere participation in hostilities by civilians, while subject to prohibition and punishment under domestic law, is not a violation of international humanitarian law, while terrorist acts (attacks on civilians and civilian objects) are indeed already prohibited.

14. It was stressed to the Working Group that counter-terrorism as a matter of national security is essentially a Member State competence, with prosecution for related offences undertaken by Member State courts. The Working Group calls on the European Union to encourage greater harmonization of response among its member States on the foundation of human rights, to eliminate the creation of options for foreign fighters to move their activity to countries with weaker regulations. Moreover, it promotes the establishment of a common European Union-level approach for ensuring remedies to victims. In this respect, the Working Group notes that the European Commission has indicated its intention to adopt an implementation report by 16 November 2017 on the protection of victims, as guaranteed by the victims' rights directive, granting certain minimum rights throughout the European Union.

D. Motivational factors

15. Authorities have reported motivations to be quite varied and individualized. Nonetheless, ideological and religious incentives apparently play a key role. The need for a sense of belonging, to be part of an exciting project or to gain a greater sense of achievement were also important motivational factors.

16. Financial compensation may also be a concern, if a less major one. Regarding payment, it is reported that wages are higher for European fighters and are in the region of $800-$1,200 per month, while recruiters may be paid $2,500 per month.

17. More recently, it has been reported by officials that salaries have been cut. Oil and natural gas revenues for terrorists in the Syrian Arab Republic and Iraq had accounted for some 500 million euros per year in the past, but now stood at half that owing to the diminishing price of oil. Furthermore, banks and other deposit points were being destroyed by airstrikes. Salaries, for example in Iraq, have reportedly been cut in turn. Many fighters are self-financing or may be funded by petty crime or family members. The Working Group learned that the main sources of financing for foreign fighter activity have been oil and natural gas sales, extortion, trafficking in persons and goods and the sourcing of funds directly through the foreign fighter network.

18. The Working Group was informed by authorities that the attacks in Paris and Brussels had been financed locally, including through Government unemployment welfare benefits. The attacks had been cheap to carry out, perhaps involving less than 5,000 euros, given that Kalashnikov rifles could be bought for roughly 200 euros, precursor materials also for a few hundred euros, with additional costs in car rental and hotel accommodation. Purchases by the perpetrators had been tracked through credit cards.

F. Recruitment

19. Recruitment has been observed as being largely through neighbourhood, peer and family networks and through the Internet and social media. It has been reported that contact with radicalized individuals in local communities increases the exposure and vulnerability

of a potential recruit to joining jihadist groups and travelling abroad to fight. Similar contact has been established and developed through radicalized friends or family members.

20. Easy access to jihadist websites has also facilitated the spread of jihadist ideology and recruitment into armed groups in Iraq and the Syrian Arab Republic. A number of European Union institution measures therefore target online propaganda and hate speech, notably through the European Union Internet Referral Unit. The European Union Internet forum also promotes effective alternative counter-narrative.[2] Efforts also address intervention at the local community level with training on counter-radicalization messages.

21. Another concern is radicalization and recruitment in prisons, prompting a programme by the Radicalization Awareness Network on this issue.

G. Measures

22. European Union institutions comprise a number of functional entities, some of which are more directly concerned with the issue of foreign fighters and have undertaken a number of measures, as outlined below.

23. The European Union proposal for a directive to combat terrorism reportedly attempts to provide a more comprehensive strategy to fight terrorism by focusing its definition of foreign fighters on those who commit terrorist-related offences. The proposal for the directive was adopted on 2 December 2015 following the terrorist attacks of 13 November 2015 in Paris. The proposal underlined the need to adapt the European Union legal framework to the evolving terrorist threat and aimed to translate international obligations into European Union law, namely, resolution 2178 (2014) on foreign terrorist fighters and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. The Working Group was informed that most of the provisions of the directive are already applicable at present (arts. 2-7 and 12-21).

24. In April 2015, the European Commission adopted the European Agenda on Security for the period 2015-2020 to support better cooperation between member States in the fight against terrorism, organized crime and cybercrime. In the Agenda, the Commission announced its intention to review and update the framework decision on terrorism in 2016, taking into account the provisions of the above Additional Protocol. This will take the form of a directive, currently under consideration. This follows the creation of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, which had been introduced by member States of the Council to implement resolution 2178 (2014). Framework Decision 2002/475/JHA on combating terrorism was amended by Framework Decision 2008/919/JHA, which required member States to criminalize public provocation to commit a terrorist offence, recruitment for terrorism and providing (but not receiving) training for terrorism.

25. The Working Group notes with concern that an impact assessment, including a human rights impact assessment, will not be undertaken for this directive, despite the fact that this is otherwise standard practice in the introduction of legislation for the European Union. It has been brought to the attention of the Working Group that the adoption process of the directive has not involved wide consultation with civil society actors.

26. The Working Group was advised that the reasons for this are the public urgency attached to responding to the perception of a growing foreign fighter threat, the assertion that it would not be necessary to do an impact assessment for legislation that has been made

[2] Communication from the Commission to the European Parliament, the European Council and the Council Brussels, 20.4.2016, COM(2016) 230 final.

mandatory, and that the new directive draws largely on pre-existing legislation and thus need not be assessed. The Working Group urges the European Commission, the Council of the European Union and the European Parliament to reconsider this approach, to acknowledge the procedural aspects of human rights and democracy and to make use of any time before the directive's adoption for consultations and human rights assessment.

27. Furthermore, the Working Group notes that in the directive acts are criminalized even if they are not directly linked to the principal offence of terrorism, and that there is a lack of clarity on the nature of intent related to an offence. The Working Group recommends the development of principles on how intent can be better established.

28. The European Commission mandated European standardization organizations to produce a "privacy by design" feature to assure protection of the right to privacy in technological designs related to security. It also proposed the Data Protection Directive for police and criminal justice authorities, adopted in April 2016.

29. The European Commission Directorate-General for Migration and Home Affairs has also created the Radicalization Awareness Network, comprising more than 1,200 experts who, inter alia, share best practices on addressing foreign fighters and undertake training on addressing returnees and preventing radicalization in prisons and on the Internet. They work with law enforcement, civil society and the judiciary.

30. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament adopted a non-binding report on 20 October 2015 related to the foreign fighters issue. The Committee recommended ways to discourage recruitment of European Union citizens as "foreign fighters" and called on European Union member States to step up judicial cooperation to that end. The strategy of discouragement should involve foreign policy, social policy, education policy, law enforcement and justice, with an emphasis on preventive rather than reactive measures and on respect for fundamental rights. On 14 April 2016, the European Parliament voted in favour of a passenger name record directive, which effectively regulates the transmission of passenger name record data by air carriers to member States, including on flights within the European Union.

31. The Working Group strongly supports the recommendations in the above-mentioned report. In its study of foreign fighters and corresponding country visits, the Working Group has emphasized the need for there to be a balance between preventive and social measures against security-oriented and punitive measures. In the particular context of the European Union, special attention must to be paid to efforts to integrate minorities and migrants and to the associated rights to equal treatment and access to opportunities. The Working Group urges that the passenger name record directive be implemented with explicit respect to the protection of the right to privacy by European Union member State citizens.

32. In 2005, the Council of the European Union adopted the Counter-Terrorism Strategy and established the position of European Union Counter-Terrorism Coordinator. The Coordinator drafted a series of 22 proposals, which were endorsed by the Council of the European Union Justice and Home Affairs Council in June 2013. These proposals are reflected in Security Council resolution 2178 (2014) of 24 September 2014.

33. The European External Action Service assists the High Representative of the Union for Foreign Affairs and Security Policy. Its Counter-Terrorism Division applies the Counter-Terrorism Strategy based on prevention, protection, pursuit and response and the updated terrorism action plan, and promotes a criminal justice approach on counter-terrorism that is reportedly based on human rights and the rule of law. This is reported to encompass an evidence-based approach as opposed to a confession-based approach to criminal justice. The European External Action Service coordinates counter-terrorism external outreach and capacity-building assistance to third countries by the European Union and its member States.

34. The Counter-Terrorism Division of the European External Action Service has undertaken three key steps in its work on the issue of foreign fighters: amplification, capacity-building and coordination.

35. Amplification and coordination entail dialogue with counterparts in the international community on counter-terrorism, with a focus on the Middle East and North Africa as countries of origin, transit and destination for foreign fighters. The European External Action Service supports the training of judges, parliamentarians and law enforcement officials on the premises of and by the International Institute for Justice and the Rule of Law in Malta. This is also done in cooperation with the United Nations Office on Drugs and Crime. Another approach supported by the European Union is the Global Fund for Community Engagement and Resilience, which funds grass-roots initiatives designed to mitigate and change conditions that have been proved to be conducive to terrorism.

36. Capacity-building initiatives have focused on training and the exchange of experiences, including issues as varied as cross-border pursuit, judicial cooperation and law enforcement, also with a focus on the Middle East and North Africa region.

37. The responses of the European Union to the challenges posed by foreign terrorist fighters include the following:

(a) Europol Focal Point Travellers agreement, with a data file also fed by non-European Union statistics;

(b) A "check the web" initiative that compares Internet content against the legal guidelines of Internet browsers;

(c) A strategic communication advisory team on the Syrian Arab Republic, with the participation of 23 European Union member States;

(d) Assistance in the Middle East and North Africa with a focus on implementing resolution 2178 (2014).

38. Regarding the above, the European External Action Service Counter-Terrorism Division advises that delivery is contingent upon adherence to human rights principles, such as prohibition against torture.

39. In terms of efforts at prevention, countering violent extremism is described as a priority by the European External Action Service, addressing the cycle from radicalization to returnee rehabilitation. Related work thus attempts to understand the push and pull factors. The Service also recognized the strong need for research on the conditions conducive to terrorism and for identifying indicators, in moving forward on countering extremism. These initiatives are further supplemented by endeavours on conflict prevention, early warning and mediation.

40. The European Union supports the work of the Hedayah institute, providing 5 million euros in grants for projects on returnees, strategic communication, research and indicators. On strategic communications, Hedayah works with companies that provide social media services. The European External Action Service promotes better communication with the Arab world and fosters related capacity-building for European Union delegations located in countries in the Middle East and North Africa.

41. The European External Action Service has identified Tunisia as one of its priority countries in the Middle East and North Africa region. It conducted an enhanced dialogue with key players and developed projects on preventing and countering violent extremism, on foreign terrorist fighters and on security reform, for which the European Union will contribute 23 million euros. This calls for careful coordination of all ongoing efforts on the ground.

42. The European External Action Service also works on countering financing for terrorism initiatives, with projects in the Middle East and North Africa and the Horn of Africa. Counter-terrorism efforts are also included for the Balkans, for countries being considered for participation in the future enlargement of the European Union, as part of the Instrument for Pre-Accession Assistance.

43. It has been reported that European arrest warrants have also been applied by European Union member States on occasion for foreign fighters.

H. Human rights implications

44. The Working Group notes that, in reacting to the pressure to develop a strong response to terrorist attacks in recent years, European Union laws and policies are being expedited, with implications for the protection of human rights.

45. Notably, the new draft directive on countering terrorism currently being considered is due to be adopted without the benefit of an impact assessment, including on human rights. This is contrary to the standard process for new laws and contradicts the specific statement by the European Commission in its communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled "The European Agenda on Security".[3] In the statement, the Commission announced that it would launch an impact assessment in 2015 with a view to updating the 2008 Framework Decision on Terrorism in 2016.

46. By not mapping and addressing potential human rights issues, the Commission allows for the possible emergence of such issues. Among those identified as particularly disturbing are the criminalization of acts ancillary to terrorism and the lack of clarity on the nature of intent related to an offence. The Working Group draws attention again to the above-mentioned communication, in which the Commission states that "all security measures must comply with the principles of necessity, proportionality and legality, with appropriate safeguards to ensure accountability and judicial redress". The Working Group calls upon the authorities of the relevant European Union institutions, including the European Commission, to apply its own principles in the case of the current draft directive.

47. The particular human rights concerns relating to resolution 2178 (2014) also need to be addressed. These include restrictions on the freedoms of movement, expression and opinion, and the right to privacy. The resolution also calls into question respect for international humanitarian law and any undermining of the corresponding legal regime in situations of armed conflict.

48. The arguments surrounding pre-existing law, urgency and the mandatory nature of adopting resolution 2178 (2014) do not supersede the individual legal obligations of European Union member States to respect, protect and fulfil human rights, as States parties to the International Covenant on Civil and Political Rights, and their collective responsibility under the Charter of Fundamental Rights of the European Union (notably articles 45 and 49).

49. The fundamental motivations of foreign fighters relating to the need for a sense of belonging may also correspond to concerns around perceived discrimination in European Union member States. This was recognized in the above-mentioned communication on the European Agenda on Security, in which the European Commission prioritized combating marginalization and promoting inclusion, and in the 2016 communication of the

[3] Available from www.cepol.europa.eu/sites/default/files/european-agenda-security.pdf.

Commission,[4] in which the Commission promoted projects to foster inclusion and intercultural understanding.

50. Similarly, in its action on countering violent extremism and promoting dialogue, the European External Action Service acknowledged the role of social factors. While these are necessarily long-term efforts, short- and medium-term initiatives, with concrete indicators developed through consultation with relevant communities, can also ensure application of the human rights-based approach and greater sustainability of impact.

51. Concerns over the right to self-determination may also apply insofar as the criminalization of ancillary offences may amount to hindering legitimate acts by peoples to seek to change their political regimes.

52. The Working Group draws attention to the fact that some foreign fighters are also children, thus entitled to the full range of regional and international children's rights and protections.

I. Returnees

53. The European Union has particular concerns regarding returnees, prompted by the coordinated attacks undertaken in the region by nationals of European Union members States returning from combat.

54. An estimated 30 per cent of foreign fighters return to their home countries.[5] A number of initiatives aim to track the movements of foreign fighters, including returnees. Plans to expand the features of the Schengen Information System and modifications to the Schengen Border Code will better ensure that information on travellers is captured.

55. As indicated above, the Radicalization Awareness Network and Hedayah, with funding from the European External Action Service, also provide projects for returnee rehabilitation.

J. Conclusions and recommendations

56. **In the aftermath of the terrorist attacks that struck at the heart of the European Union, there has been growing pressure to respond. The sense of urgency must not, however, allow for compromise in the protection of human rights. It must also ensure that the root causes of terrorism are addressed.**

57. **Notwithstanding the existence of human rights counter-terrorism guidelines, and the assertion of the application of the Charter of Fundamental Rights, the Working Group emphasizes that the reported commitment of the European Union to mainstream human rights into all of its approaches and activities, including in how resolution 2178 (2014) is promoted to third countries, must be realized.**

58. **The Working Group welcomes efforts to better understand the foreign fighter phenomenon, including research on motivating factors and the development of**

[4] Communication from the Commission to the European Parliament, the European Council and the Council on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union, available from http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20160420/communication_eas_progress_since_april_2015_en.pdf.

[5] Ibid.

indicators. It hopes that this will ensure a more even balance in the response to foreign fighters, one that covers preventive and punitive measures equally.

59. The fact that foreign fighters are often motivated by seeking a sense of belonging makes social factors of particular concern when addressing the phenomenon. Measures should specifically ensure effective integration of minorities and migrants.

60. The Working Group urges European Union members States to be mindful of their obligations as States parties to international instruments, including the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which emphasize freedom from discrimination and equal access to employment and equal rights to participate in public life. It commends ongoing initiatives towards intercultural dialogue and mutual respect among communities.

61. The Working Group further supports enhanced information gathering, notably for registration in databases and information-sharing across departments, agencies and member States, such as the Schengen Information System and the new passenger name record directive. Information-gathering measures must include the explicit recognition of the right to privacy and related protections, for example securing the identity of persons entered into databases. In this respect, the Working Group acknowledges the potential usefulness of a "privacy by design" standard promoted in the European Agenda on Security, and the newly adopted Data Protection Directive.

62. In the interest of cooperation, the Working Group recommends that member States of the European Union avail themselves more systematically of the services of Eurojust. This should facilitate mutual legal assistance agreements and improved evidence gathering, including with third, non-European Union, countries. Similarly, more widespread application of the European Arrest Warrant can allow for useful cross-border action.

63. The Working Group recommends that the European Parliament Committee on Civil Liberties, Justice and Home Affairs consider the implications of the foreign fighter phenomenon for human rights in the European Union, and means for addressing them.

64. The Working Group also encourages the convening of public hearings by relevant committees of the European Parliament on human rights and the issue of foreign fighters, with a view to linking human rights to the issue of foreign fighters, as conceived and addressed at the European Union level.

65. The Working Group believes that recent events have brought the European Union to an important juncture in its approach to security and defence. This approach must be firmly anchored in the foundation of human rights and democracy, which it so fundamentally enshrines and promotes.

III. Private military and security companies

A. Background and context

66. The Working Group has, since its establishment in 2005, been mandated to monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy and security services on the international market (see Commission on Human Rights resolution 2005/2 of 7 April 2005).

67. The Human Rights Council, in its resolution 30/6, and the General Assembly, in its resolution 70/142, requested the Working Group to consult States, intergovernmental and non-governmental organizations and other relevant actors of civil society in the implementation of those resolutions, and to report to them. The Council and Assembly recommend that all Member States, including those confronted with the phenomenon of private military and security companies, as contracting States, States of operations, home States or States whose nationals are employed to work for a private military or security company, contribute to the work of the separate open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, taking into account the work done by the Working Group.

68. The Working Group provides resource persons to the open-ended intergovernmental working group, which has considered a draft convention on private military and security companies and concept note on elements of a convention, both prepared by the Working Group. Neither the draft convention nor the concept note have received support from the open-ended intergovernmental working group.

B. Activities of private military and security companies

69. The European Union employs private security companies in both its civilian and police missions and its military operations. Civilian missions having used such companies, largely for protecting their premises and/or as bodyguards, include the European Union Rule of Law Mission in Kosovo,[5] the European Union Police Mission in Bosnia and Herzegovina, the European Union Coordinating Office for Palestinian Police Support and the European Union Police Mission in the Democratic Republic of the Congo.

70. Private contractors have supplied a wide variety of services to support European Union military operations, with justifications including troop limitations, lack of specific capabilities and financial constraints. These operations include the European Union military operations in the former Yugoslav Republic of Macedonia, the Democratic Republic of the Congo, Bosnia and Herzegovina, the Gulf of Aden, Chad, the Central African Republic and Somalia.[6]

71. More recently, European Union missions in Mali and the Mediterranean have reportedly contracted private air transport services.

72. In most cases, military support services are contracted by the member States involved in the military operations, each of which applies its specific national legislation. Services provided encompass, for example, private guarding of installations and personnel, provision of helicopters, logistical support, maintenance and translation.

C. Human rights implications and international law

73. The Working Group again expresses its concern that the different standards in national legislation and policies concerning the use of private security companies make for patchy and inconsistent regulation at the European Union level. Differences may be observed in, for example, licensing and registration of such companies, selection and

[5] See "The Role of Private Security Companies in CSDP Missions and Operations", p. 13, available from www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET(2011)433829_EN.pdf.

[6] Ibid., p. 14.

training of personnel, permitted and prohibited activities and rule on the acquisition of weapons. The Working Group urges harmonization of regulations to ensure even standards across the region and to move towards predictable accountability for human rights violations.

74. While the information on the impact of private security companies on the ground at mission locations is limited, there are common concerns about the impact that the use of such companies has on human rights. Among those concerns is the clear distinction between security and military services. The Working Group is not aware of any definition applied in European Union legislation that clarifies this distinction, but it nonetheless has legal significance, notably for the application of international humanitarian law to contexts of armed conflict.

75. The argument is often made that private security company personnel are not engaging in conflict if they employ defensive, rather than offensive, use of force. However, if such personnel are knowingly and willingly guarding a military objective in armed conflict, they are directly participating in hostilities and are targetable. On the other hand, if the personnel are guarding civilians or civilian objects, they are not targetable. The recognition of that distinction should guide contracting and regulation, and has implications for accountability of personnel under international law for violations committed.

76. Also of concern is the varying accountability for human rights violations in third countries by private military and security companies originating from European Union member States. During the Working Group's visit, officials made the argument that national jurisdictions would ensure accountability through local procedures and courts. However, the Working Group asserts that many countries in armed conflict, and others that serve as locations for the activities of private security companies, do not have robust enough State structures and judicial functioning to assure access to justice for victims of violations.

77. The European Union, however, emphasized its strong support for the implementation of the Guiding Principles on Business and Human Rights, which also apply to private military and security companies. The upcoming European Union action plan on responsible business conduct will address the implementation of the Guiding Principles, including with regard to due diligence and access to remedy. The European Union also welcomed the ongoing efforts by the Office of the United Nations High Commissioner for Human Rights on enhancing accountability and access to remedy, and the recent report of the High Commissioner on improving accountability and access to remedy for victims of business-related human rights abuse,[8] recognizing that the initiative may provide best practices that can be implemented at the European Union and member State levels, including on improved cooperation between States in cross-border cases.

D. Regulation of private military and security companies

78. The key approach to the contracting of private security companies within the European Union is reportedly through procurement procedures that involve the possible exclusion of companies whose records do not meet European Union stipulations. All security contracts include an explicit reference to the Montreux document and International Code of Conduct.

79. The Working Group was advised that the European Union relies on civil society input to the development of the blacklist, notably conveying any allegations or legal

[8] A/HRC/32/19.

proceedings about private military and security companies or their personnel. The Working Group urges greater awareness-raising by the European Union about this platform and its related processes, and encourages civil society actors to actively participate.

80. The European Court of Justice has established the competence of the European Commission over private security companies in several rulings that identify private security services as an "economic sector". As such, the Working Group learned during the mission that European Union level regulation was also viewed with some reluctance because of perceived potential to cause internal market distortions.

81. The Council of the European Union decided in 2006 to exclude private security services from the directive on services in the internal market. The Working Group learned that this decision was taken upon the request of representatives of the private security industry who argued that it would not support their business. As such, the sector remains unregulated in the European Union market. The Commission was tasked instead with assessing the possibility of presenting a separate proposal for the harmonization of regulations concerning private security services by 28 December 2010.

82. The European Parliament has been in favour of harmonizing member States' regulations of the private security sector, and the Council adopted on 13 June 2002 a recommendation regarding cooperation between the competent national authorities of member States responsible for the private security sector. In 2011, the European Parliament's Directorate General for External Policies published a report on the role of private security companies in Common Security and Defence Policy missions and operations, which urged the development of appropriate mechanisms to address the possible problems of such companies use before they occur, such as decreased democratic accountability and governmental control, the perceptions of contractor impunity, and insecurity among the civilian populations of host States.

83. The Parliament further recommended the creation of a common list of military and security services; common guidelines for the hire, use and management of military and security contractors in Common Security and Defence Policy operations; a directive (Internal Market) setting minimum standards for private security service providers within the European Union; a Council decision (Common Foreign and Security Policy), regulating the export of private military and security services, as defined in the Common Service List, to destinations outside the European Union; and Council decisions (Common Foreign and Security Policy) including military and security services into European Union embargoes.[9] The Working Group was not made aware of any action on any of these recommendations.

84. In December 2015, the European Parliament convened a public hearing in Brussels on the use of private security companies in the context of European security and defence, organized by the European Parliament Committee on Foreign Affairs, Subcommittee on Security and Defence. The Working Group supports the European Union public dialogue on the activities of private military and security companies, particularly regarding their impact on human rights.

85. The Working Group learned during its visit that the European Parliament Sub-Committee on Security and Defence is preparing an initiative report on European Union regulation of private military and security companies for possible consideration by parliament. It urges the relevant parties to ensure that the process brings about active discussion and informed decision-making on the issue.

86. The Working Group was also apprised of both political and procedural challenges to the development of European Union level regulation of private military and security

[9] Ibid., p. 39.

companies. It is aware that changing the Services Directive may be politically onerous and time-consuming. Also, any legislation issued at the European Union level has to respect the principles of attribution subsidiarity and proportionality as reflected in European Union law.

87. Nonetheless, there seems to be some early momentum towards the deliberation of a European Union level approach. Member State concerns regarding state monopoly on the use of force, on economic consequences, or otherwise, need to be openly aired and robustly addressed in European Union institutions, by the European Parliament and or the European Commission and or the European External Action Service.

88. Such efforts should draw upon all sources of relevant research, evidence and information, providing arguments and counter-arguments for all options, and in different progressions. Greater consideration by European Union institutions could be given to voluntary regulation, model laws, expanded jurisdictions and a global convention for universal application, examining national, regional and international approaches. Ultimate consideration for accountability and for the protection of victims and potential victims of human rights by private military and security companies should guide decision-making in this regard.

89. In July 2012, the European Union, as an international organization, joined the Montreux Document and 23 of its member States support the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, a non-binding instrument composed of two parts. Part one reiterates the obligations of States and private military and security companies under international law. Part two outlines a wide range of good practices for contracting States regarding the hire, use and oversight of private security companies. During the 2014 meeting of the Montreux Document Forum, the European Union, as an international organization, was elected to become a member of the Group of Friends of the Chair. The European Union is also a strong supporter of the International Code of Conduct for Private Security Service Providers and the requirements of the International Organization for Standardization on a management system for private security operations (ISO 18788).

E. Conclusions and recommendations

90. **The Working Group underscores that the transnational nature of the activities of private military and security companies compels supranational action for regulation. While it was made clear during the mission that the primary responsibility for security rests with member States, this approach cannot fully or effectively counter cross-border organizations, actors or actions.**

91. **The Working Group acknowledges the practical and preliminary value of volunteer efforts concerning international regulation, including the International Code of Conduct. At a minimum, and with a view to improving the accountability of private military and security companies for their activities, the Working Group calls on the European Union to encourage consideration of legislation that would require all such companies registering in, operating in, or under contract to European Union member States to maintain membership in good standing in the International Code of Conduct for Private Security Service Providers' Association.**

92. **However, these initiatives are non-binding and voluntary, with no significant penalty for non-compliance or for the commission of human rights violations, beyond being expelled from the International Code of Conduct for Private Security Service Providers' Association and losing out on valuable contracts. In countries in armed**

conflict, or those with weak State structures, this amounts to negligible accountability for violations.

93. The Working Group's ongoing global study of national regulations on private military and security companies further demonstrates that there are gaps in all geographic regions in the accountability covered by national legislations and variation among them. An international legally binding instrument would ensure consistent standards across regions. It would require States to implement measures to ensure registration and licensing of private military and security companies, adequate vetting and training, including in human rights. It would further establish a mechanism for monitoring the activities of those companies, lay down the scope of prohibited and permissible activities, foster mutual legal assistance and expand jurisdiction for accountability and remedy for victims.

94. The Working Group encourages the European Union, in the context of its participation in the open-ended intergovernmental working group established by the Human Rights Council, to urge its member States to consider the possibility of an internationally binding instrument for the regulation of private military and security companies, to acknowledge that the existing mechanisms to regulate the private military and security industry, including domestic law, the non-binding Montreux Document and the voluntary International Code of Conduct, are inadequate to assure compliance with international law and that additional international regulation is therefore both warranted and necessary.

95. The significant role of private military and security companies in European Union activity should prompt key European Union actors to seize the opportunity for advancement on an issue with profound implications for human rights protection within and outside the European Union.